No. 93-933 (3)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1993

MARITIME OVERSEAS CORPORATION AND ATLANTIA TANKER CORPORATION,
Petitioners

versus

HAE WOO YOUN,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether separate itemized awards of general damages under either the Jones Act or the general maritime law for disability and disfigurement, in addition to pain and suffering and mer tal anguish and loss of enjoyment of life, constitute double recovery where the total award of general damages is found not to be excessive?

2. Whether a Jones Act seaman can recover prejudgment interest pursuant to the general maritime law?

3. Whether a seaman must, in addition to proving his loss of employer-provided food and clothing, prove the precise value of that food and clothing in order to recover for loss of found?

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JURISDICTION

Petitioners seek to invoke this Court's jurisdiction to review a final judgment of the Louisiana Supreme Court pursuant to 28 U.S.C. § 1257(a), which provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where

> the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held by or authority exercised under, the United States.

The petition was filed timely, and respondent concedes the Court's jurisdiction as to the third question presented. Respondent, however, disputes the jurisdiction of this Honorable Court as to the first two questions presented. As is explained more fully below, petitioner's claims as to these issues were not "specially set up or claimed" in the lower courts, and to the extent these questions were resolved, they were resolved on independent and adequate state grounds. Accordingly, the Court lacks jurisdiction as to these questions under *Hill v. California*, 401 U.S. 797, 805-06, 91 S.Ct. 1106, 1111-12 (1971), and *State Farm Mut. Auto. Ins. Co. v. Duel*, 324 U.S. 154, 160, 65 S.Ct. 573, 576 (1945) (both characterizing the rule against deciding claims not pressed or passed upon by a state court as jurisdictional).

STATEMENT OF THE CASE

Respondent, Hae Woo Youn, was the boatswain on the M/T ATLANTIA. On May 23, 1989, on the Mississippi River in St. James Parish, Louisiana, a winch on board the ATLANTIA failed, allowing a boom to fall toward several crewmembers. As he rushed to protect the other crewmembers by attempting to stop the boom, the boom cable wrapped around Youn's leg,

and the full weight of the boom crushed and nearly amputated his thigh. As a result, Youn is totally and permanently disabled.

Youn brought suit against petitioners, Atlantia Tanker Corporation ("Atlantia") and Maritime Overseas Corporation ("MOC"), the shipowners and his employers, alleging negligence under the Jones Act, 46 U.S.C. § 688, and unseaworthiness under the general maritime law. MOC's insurer, Assuranceforeningen GARD, was later added as a defendant pursuant to the Louisiana Direct Action Statute, La. R.S. 22:655. One element of damages sought was loss of "found," that is, the value of the food and clothing received aboard ship by a seaman as a benefit of his employment, which is lost when the seaman can no longer work on board ship. There was no question but that Youn had suffered this loss, so plaintiff's expert economist calculated the value based upon a per diem rate of $10. Following a bench trial, the court found the defendants liable and awarded damages as follows:

Future medical expenses	$40,000.00
Past loss of net earnings	22,642.00
Future loss of net earnings	200,000.00
Past loss of found	3,748.00
Future loss of found	37,474.00
Past physical pain and suffering	200,000.00
Future physical pain and suffering	300,000.00

Past mental anguish and loss of enjoyment of life	200,000.00
Future mental anguish and loss of enjoyment of life	300,000.00
Disability and disfigurement	400,000.00

(Reasons for Judgment, Appendix L, pp. 82a-92a.)

The trial court also awarded interest from the date of judicial demand on the entire amount of damages.

All defendants appealed suspensively. Petitioners, Atlantia and MOC, assigned twelve errors, which are recited verbatim in the opinion of the Louisiana Fifth Circuit Court of Appeal. Atlantia and MOC assigned as errors on the general damages and prejudgment interest issues:

8.

The trial court's award of general damages in the amount of $1,400,000.00 is excessive. The award should be substantially reduced or set aside and a new trial ordered.

9.

The trial court erred in awarding prejudgment interest as to the entire damage award since a substantial portion of the award represents future losses for which interest would not have accrued.

Youn v. Maritime Overseas Corp., 605 So.2d 187, 192 (La. App. 5th Cir. 1992) (Appendix E, pp. 18a-69a, at p. 21a).

The court of appeal affirmed the liability findings of the trial court, but modified a number of the damage awards. Specifically, the court of appeal found that "a total of $600,000.00 is the maximum amount the trial court could have reasonably awarded," 605 So.2d at 204, Appendix at p. 50a; that prejudgment interest was not awardable on future damages, 605 So.2d at 204, Appendix at p. 52a; and that the trial court erred in awarding found, 605 So.2d at 208, Appendix at p. 60a.

After rehearing was denied by the court of appeal, Youn and Atlantia and MOC sought writs of certiorari and/or review from the Louisiana Supreme Court. Again, Atlantia and MOC assigned as error, *inter alia,* the excessiveness of the total general damage award (as reduced by the court of appeal). They did not, however, complain of the award of prejudgment interest. The Louisiana Supreme Court granted Youn's writ application on the issues of the reduction of general damages and the disallowance of found, *Youn v. Maritime Overseas Corp.*, 609 So.2d 239 (La. 1992) (Appendix F, pp. 71a-72a), but the court denied Atlantia and MOC's application, *Youn v. Maritime Overseas Corp.*, 609 So.2d 240 (La. 1992) (Appendix F, p. 70a). Atlantia and MOC then petitioned this Court for certiorari, which was denied. (Appendix G, p. 73a.) Their petition for rehearing was also denied. (Appendix H, p. 74a.)

The Louisiana Supreme Court partially reversed, finding that the trial court had not abused its discretion in awarding general damages. *Youn v. Maritime Overseas Corp.*, 623 So.2d 1257, 1261 (La. 1993) (Appendix A, pp. 1a-13a, at p. 11a).

The supreme court also reinstated the award of found, holding:

> Plaintiff clearly suffered this loss, inasmuch as he will never again receive these sums from his employer while aboard ship. The only issue is the precise value of the loss.
>
> . . . .
>
> Here, the trial judge set the award for loss of found at $10 per day on the basis of evidence that plaintiff's employer had provided meals, lodging and clothing to him daily and the trial court's inference that these daily items would cost at least that amount. Moreover, awards for loss of found in other reported decisions have far exceeded that daily amount. We conclude that the award of $10 per day was supported and should have been upheld.
>
> 623 So.2d at 1261-62 (Appendix A, at pp. 12a-13a).

Atlantia and MOC applied for rehearing. As is noted in their petition for certiorari, Petition p. 5, this rehearing application was the first time they raised the issues of purported double recovery and prejudgment interest. The Louisiana Supreme Court denied the application for rehearing without comment. (Appendix B, p. 14a.)

SUMMARY OF ARGUMENT

The judgment of the Louisiana Supreme Court is correct, but this Court should not reach the merits of that judgment. The petition for certiorari should be denied with respect to the questions of purported double recovery and prejudgment interest because these issues were neither properly presented to nor decided by the Louisiana Supreme Court or any other lower court. Under Louisiana procedural law, a contention raised for

the first time in an application for rehearing before the Louisiana Supreme Court will not be considered. Accordingly, petitioner's arguments on these grounds are procedurally barred. That Louisiana procedural rule constitutes an independent and adequate state ground for the decision that is not subject to review by this Court under 28 U.S.C. § 1257.

Further, since these issues were not properly raised below, certiorari should be denied because this Court does not decide claims "not pressed nor passed upon" in state court. Whether that rule is jurisdictional or prudential, the considerations of comity underlying the rule would be frustrated by reviewing this state court judgment for purported errors never properly urged by these civil defendants.

Finally, as to the remaining question regarding found, the petition should be denied because it presents a factual question concerning sufficiency of the evidence. The evidence in this case has already been reviewed by three courts. State court findings of fact are entitled to deference, and no question of national importance is raised by the conclusion of the Louisiana Supreme Court.

ARGUMENT

I. The Petition Should Be Denied Because Petitioners Failed to Properly Raise the Issues of Purported Double Recovery and Prejudgment Interest Below

In *Michigan v. Tyler,* 436 U.S. 499, 98 S.Ct. 1942 (1978), a state criminal prosecution, the State of Michigan asked this

Court to consider a criminal defendant's standing to object to unconstitutional searches. The Michigan Supreme Court had refused to consider this argument due to the state's failure to raise the issue in either the trial court or the intermediate appellate court. This Court also refused to entertain the argument, holding:

> Failure to present a federal question in conformance with state procedure constitutes an adequate and independent ground of decision barring review in this Court, so long as the State has a legitimate interest in enforcing its procedural rule. . . . . Accordingly, we do not entertain the petitioner's standing claim which the state court refused to consider because of procedural default.
>
> 436 U.S. at 512 n.7, 98 S.Ct. at 1951 n.7.

Similarly, in *Stembridge v. Georgia,* 343 U.S. 541, 72 S.Ct. 834 (1952), the defendant raised a constitutional issue for the first time in a motion for rehearing in the intermediate appellate court, in violation of Georgia's rule that constitutional questions must first be raised in the trial court. The Georgia Supreme Court denied certiorari without an opinion. This Court held, "At this stage, the Supreme Court of Georgia could have denied certiorari on adequate state grounds. Where the highest court of a state delivers no opinion and it appears that the judgment *might* have rested upon a nonfederal ground, this Court will not take jurisdiction to review the judgment." 343 U.S. at 547, 72 S.Ct. at 837. The Court thus dismissed the petition for certiorari as improvidently granted. *Id.* at 548, 72 S.Ct. at 838.

This petition for certiorari should be denied, because petitioners' failure to raise the questions of purportedly duplicative

damage awards and prejudgment interest prior to their application for rehearing constituted a waiver of those claims under Louisiana procedural law. The Louisiana rule was stated in *Rodrigue v. LeGros,* 563 So.2d 248, 257 (La. 1990) (on application for rehearing), "We generally do not grant rehearings to consider issues raised for the first time in the application for rehearing. *Rayner v. Rayner,* 216 La. 1099, 45 So.2d 637 (1950); *State ex rel. Murtagh v. Department of City Civil Serv.,* 215 La. 1007, 42 So.2d 65 (1949)." In *Rodrigue,* the court held that a Louisiana statute did not apply to maritime contracts. The losing party then applied for rehearing, urging for the first time that the contract at issue was not maritime. The court refused to grant rehearing on this new issue.

The same result was probably reached here. Atlantia and MOC raised completely new issues in the application for rehearing. Although the Louisiana Supreme Court did not issue an opinion stating the reasons for the denial of rehearing, it is likely that the court denied the rehearing based upon the rule of *Rodrigue v. LeGros, supra.* That being the case, the basis for the decision was Louisiana procedural law, rather than federal substantive law, and this Court has no jurisdiction over these issues.

Even if petitioners' failure to present their arguments to the Louisiana Supreme Court prior to rehearing were not an adequate and independent state ground for the judgment, the petition for certiorari on these issues would have to be denied on the basis of this Court's traditional rule that "precludes a grant of certiorari . . . when the question presented was not pressed or passed upon below." *United States v. Williams,* ___ U.S. ___, 112 S.Ct. 1735, 1738 (1992) (internal quotations

omitted). The Court has repeatedly refused to consider issues that were not properly presented in the lower courts, particularly state courts. For instance, in *Exxon Corp. v. Eagerton*, 462 U.S. 176, 103 S.Ct. 2296 (1983), the appellant had initially raised a preemption argument in their appellate brief before the Supreme Court of Alabama, but that court did not pass on the issue. Noting the "general practice" of the Alabama appellate courts to refuse to consider issues raised for the first time on appeal, this Court stated:

> The decision below does not discuss this issue, and when " 'the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.' "
>
> 462 U.S. at 181 n.3, 103 S.Ct. at 2301 n.3, *quoting Fuller v. Oregon*, 417 U.S. 40, 50 n.11, 94 S.Ct. 2116, 2123 n.11 (1974), *quoting Street v. New York*, 394 U.S. 576, 582, 89 S.Ct. 1354, 1360 (1969).

This same language was quoted in *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550, 107 S.Ct. 1940, 1948 (1987), where the appellants failed to present the issues to the California appellate court until a petition for rehearing was filed; this Court again refused to address the issue.

The fact that federal law was intrinsically at issue in this maritime law case does not save petitioners from their failure to properly raise these issues. An analogous situation was pre-

sented in *Illinois v. Gates,* 462 U.S. 213, 103 S.Ct. 2317 (1983). The Court there held that where only the applicability of the exclusionary rule had been at issue below, the State of Illinois had not properly raised the issue of a potential modification of the exclusionary rule. In the present case, of course, petitioners have contended that the damage award was excessive as a matter of fact, but they have now abandoned that claim in favor of an argument that the damages are duplicative as a matter of law. The first argument is not sufficient to save the second, because the issues are completely different.

Although some cases have suggested that this is a prudential rule, *see* discussion in *Illinois v. Gates, id.* at 217-24, 103 S.Ct. at 2321-25, respondent submits that, in cases arising from state courts, this rule is jurisdictional. In *Webb v. Webb,* 451 U.S. 493, 101 S.Ct. 1889 (1981), the Court clearly set forth the rule's basis in 28 U.S.C. § 1257, which "requires that in the state courts petitioner have 'specially set up or claimed under the Constitution . . . of . . . the United States' that right which she now seeks to have this Court enforce." 451 U.S. at 495, 101 S.Ct. at 1891. After concluding that the petitioner had not done so, the Court dismissed the writ for want of jurisdiction. *Id.* at 501-02, 101 S.Ct. at 1894.

But regardless of whether the rule is prudential or jurisdictional, the policy that motivates the rule is one of comity between the federal and state judicial systems. As the Court stated in *Webb v. Webb, supra*:

> [A]lthough the States are sovereign entities, they are bound along with their officials, including their judges, by the Constitution and the federal statutory law. Principles of

> comity in our federal system require that the state courts be afforded the opportunity to perform their duty, which includes responding to attacks on state authority based on the federal law, or, if the litigation is wholly private, construing and applying the applicable federal requirements.
>
> 451 U.S. at 499, 101 S.Ct. at 1893.

These principles would hardly be served by ordering review of this case. Three levels of the Louisiana judicial system have performed their duty of reviewing this case. But now petitioners seek to have this Court perform a fourth review, on bases that were never properly presented to the Louisiana courts. This would render the years of work on this case by Louisiana courts essentially meaningless, because they would never have known what the "real issue" was. It would also place this Court in the position of a court of first resort, because the lower courts would have never had the opportunity to resolve the issue correctly, never having had it presented to them. This is manifestly not the situation contemplated by § 1257.

The Louisiana Supreme Court's denial of rehearing was based upon an adequate state ground: the petitioners' procedural default in failing to raise these issues prior to rehearing. Further, this Court's rules require that a federal question be properly pressed and passed on below, and these purported questions were not. The Court should deny the petition as to the first two questions presented, the purported duplication of damages and the propriety of prejudgment interest, because petitioners failed to properly present these issues to the Louisiana courts.

II. The Petition Should Be Denied on the Found Issue Because It Seeks a Review of the Sufficiency of the Evidence

In the third question presented, petitioners are asking this Court to review the sufficiency of the evidence supporting the award for loss of found. The trial court determined that respondent had proved his claim for loss of found. The court of appeal disagreed, but the Louisiana Supreme Court reversed and reinstated the trial court's judgment. There is no reason to perform a third appellate examination of this record through the use of this Court's certiorari power.

Because this Court is primarily concerned with momentous legal issues, the Court "customarily accept[s] the factual findings of state courts in the absence of 'exceptional circumstances.' " *California Retail Liquor Dealers Ass'n v. Midcal Aluminum,* 445 U.S. 97, 111-12, 100 S.Ct. 937, 946 (1980). "Even where a question of fact may have constitutional significance, [the Court] normally accord[s] findings of state courts deference in reviewing constitutional claims here." *Time, Inc. v. Firestone,* 424 U.S. 448, 463, 96 S.Ct. 958, 969 (1976). Yet petitioners seek to have the Court spend its time scouring the record in this case. While factual review is sometimes a necessary incident to cases properly before the Court, the Court "do[es] not grant a certiorari to review evidence and discuss specific facts."*United States v. Johnston,* 268 U.S. 220, 227, 45 S.Ct. 496, 497 (1925). The petition should be denied.

CONCLUSION

This case has been tried, appealed, and appealed again. Petitioners now ask this Court to grant certiorari to consider, for the first time, two legal issues never presented to the lower courts and to reconsider the facts as found by Louisiana's highest court. Petitioners' requests are contrary to the established considerations governing the granting of certiorari. The petition should be denied at petitioners' costs.

Respectfully submitted:

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